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IN THE
Supreme Court of the United States OF THE CLERK

OCTOBER TERM, 1991

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAIL-
WAY COMPANY REPRESENTED BY THE UNITED TRANS-
PORTATION UNION, THE BROTHERHOOD OF MAINTENANCE
OF WAY EMPLOYEES, THE BROTHERHOOD OF AIRLINE
CLERKS AND THE BROTHERHOOD OF RAILWAY CARMEN,

Petitioners,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE
COMMISSION, and the BUTTE, ANACONDA & PACIFIC
RAILWAY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

**BRIEF IN OPPOSITION OF BUTTE,
ANACONDA & PACIFIC RAILWAY COMPANY**

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Date: January 16, 1992

QUESTIONS PRESENTED

1. In an arbitration pursuant to *New York Dock* labor protective conditions prescribed by the Interstate Commerce Commission ("ICC") upon approval of an acquisition of control of a railroad, where the arbitrator finds that adverse job effects were caused by extraneous economic conditions but nevertheless holds that the railroad employer is liable for *New York Dock* benefits by reason of a contract with the ICC and the employees to pay benefits regardless of the cause of adverse job effects, was it arbitrary, capricious or in excess of statutory powers for the ICC to reverse the arbitration award on the grounds that the arbitrator exceeded the scope of his jurisdiction and that the award failed to draw its essence from the conditions prescribed by the Commission, in that the arbitrator fashioned a non-existent contract without Commission approval and erred on the meaning of causal nexus linking the approved acquisition of control and adverse job effects?

2. Was it arbitrary, capricious or in excess of statutory authority for the ICC to adjudicate in one case (the so-called *Lace Curtain* case) that it would review arbitrations conducted under *New York Dock* conditions and then apply that holding to a pending case (i.e., the case before this Court on the petition for a writ of certiorari)?

3. Was it a denial of due process "under the Fourteenth Amendment to the U.S. Constitution" for the ICC to grant a previously filed petition for intervention no earlier than the same time that it issued its first decision on the merits of this controversy?

4. Is there a conflict between a ruling of the Eighth Circuit that an arbitration is governed by the Railway Labor Act ("RLA") when parties to a merger protection agreement approved by the ICC agree to be bound by that Act, and the ruling below of the Ninth Circuit which affirmed the ICC in reviewing an arbitration pursuant to the *New York Dock* conditions, where the parties had not agreed to employ RLA procedures?

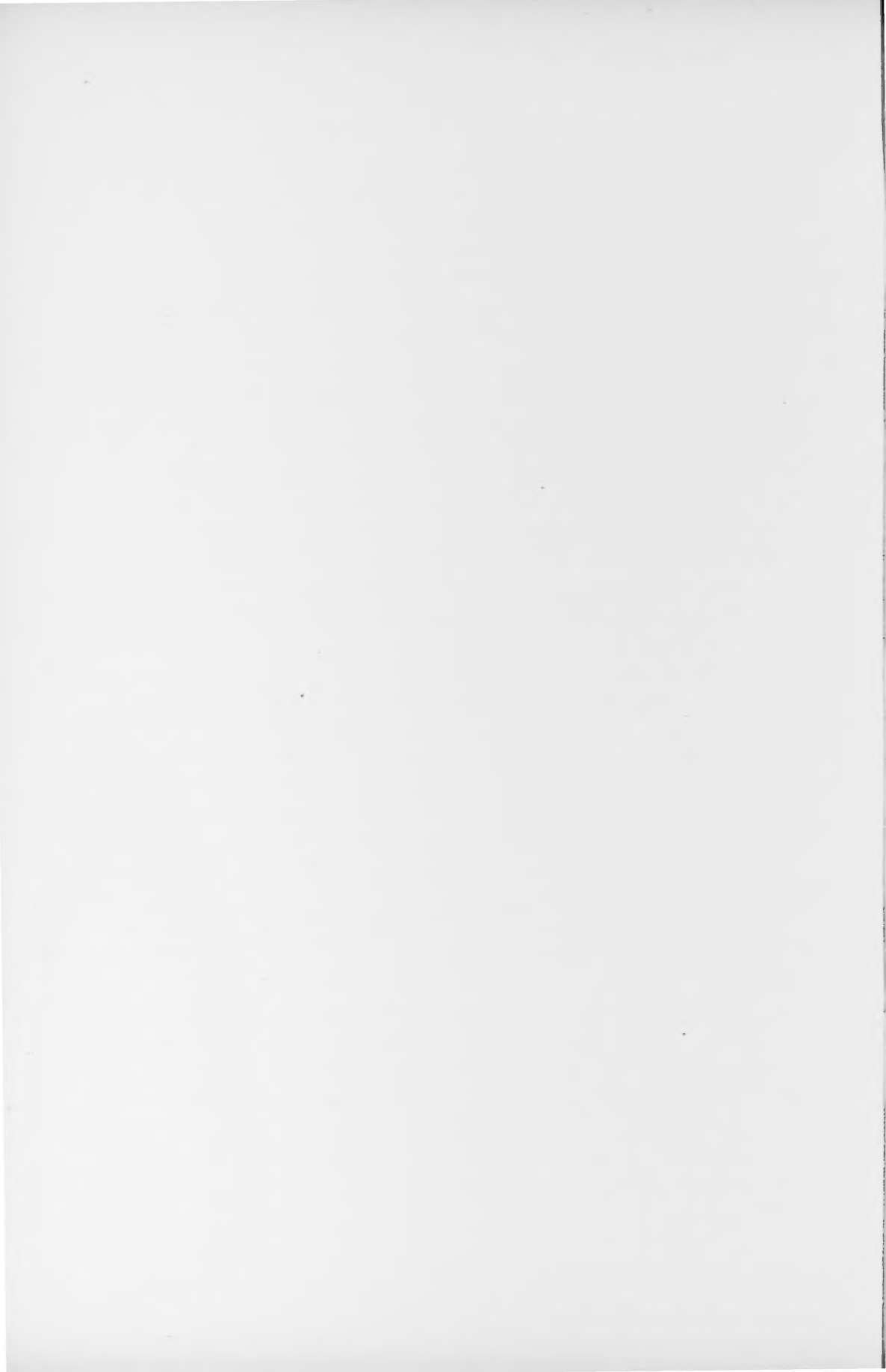


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-982

EMPLOYEES OF THE BUTTE, ANACONDA & PACIFIC RAIL-
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**BRIEF IN OPPOSITION OF BUTTE,
ANACONDA & PACIFIC RAILWAY COMPANY**

Respondent Butte, Anaconda & Pacific Railway Com-
pany ("BA&P")¹ respectfully requests that the petition
for writ of certiorari be denied.

¹ In compliance with Rule 29.1 of the Rules of this Court, the
parent of BA&P is Atlantic Richfield Company, a Delaware corpora-
tion. There are no subsidiaries of BA&P.

COUNTERSTATEMENT OF THE CASE

In 1978 the Interstate Commerce Commission ("ICC" or "Commission") approved control of the Butte, Anaconda & Pacific Railway Company ("BA&P") by Atlantic Richfield Company ("ARCO") and The Anaconda Company, a Delaware Corporation ("Anaconda") (Appendix E, 61a).² As it was required by former Section 5(2)(f) of the Interstate Commerce Act ("IC Act"), recodified as 49 U.S.C. § 11347, the Commission prescribed labor protective provisions even though the change of control was not one that would result in a change in the operations of the acquired carrier and, therefore, could not cause the dismissal or displacement of any employees.³ The Commission at first prescribed the so-called "New Orleans Conditions" (Appendix E, 64a) but later substituted the *New York Dock* conditions for those originally imposed (Appendix D, 55a *et seq.*).⁴ The imposed conditions require

² Appendix refers to the Appendices attached to the Petition for a Writ of Certiorari.

³ When two or more railroads, previously operated independently, are combined, merged or coordinated, there are inevitable job dislocations that have traditionally been the basis for job benefits. See, *Railway Labor Executives Association v. United States, et al.*, 339 U.S. 142, 147-150 (1950); *Norfolk and Western Railway Co. v. Nemitz*, 404 U.S. 37 (1971) ("Nemitz"). The change of control here was not such a transaction.

⁴ The *New York Dock* conditions were first prescribed in *New York Dock Railway Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 84-90 (1977), *aff'd sub nom. New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979). The conditions require railroad employers to provide pay and other benefits for employees adversely affected by mergers or other consolidations for periods up to six (6) years. The conditions are intended to apply to "any action taken pursuant to authorizations of this Commission" that "may cause the dismissal or displacement of any employees, or rearrangement of forces." See Article I, Sections 1(a) and 4, 360 ICC at 84-85, and Appendix D at 59a. These provisions, among others, are construed as requiring complaining employees to prove that alleged adverse job effects were caused by action authorized by the Commission. See Appendix C, 50a.

arbitration of "any dispute or controversy with respect to the interpretation, application or enforcement" of the terms of the conditions. 360 ICC at 87.

In 1980 the copper industry suffered a severe decline as a result of falling prices and rising imports that caused BA&P's principal customer, Anaconda, to curtail its copper mining operations. Appendix C, 52a; Appendix B, 16a. Consequently, the railroad lost 98% of its traffic (copper ore concentrate) by 1983, resulting in a 77% reduction in employment.⁵ In 1982 petitioner United Transportation Union ("UTU") asserted in discussions with BA&P officials that job changes triggered *New York Dock* benefits. BA&P disagreed, contending that the job changes were not causally related to the transfer of control to ARCO approved by the ICC in 1978 but rather to the negative economic conditions of the copper industry which were first experienced in 1980. UTU then caused the National Mediation Board ("NMB") to appoint Mr. Jack W. Cassle as arbitrator, effective June 24, 1982.

BA&P's attempt to enjoin the arbitration was not successful. Appendix F, 67a. The arbitration, therefore, proceeded before a panel, consisting of Arbitrator Cassle as the neutral, and representatives from each of the railroad and the union. On September 26, 1984, Arbitrator Cassle issued a decision on the merits, holding that employees were entitled to *New York Dock* benefits. He reasoned that because ARCO and Anaconda had stated in their application to the ICC that employees were not expected to be adversely affected, they had entered into a "contract" with the ICC and the employees to pay benefits for post-transaction job dislocations *regardless of cause*. Appendix I, 103a. He also found that the approved acquisi-

⁵ Transcript of Arbitration (February 27, 1984) at 147; See also, Appendix C, 38a-39a. The carriers primary operation was hauling Anaconda's copper ore concentrate from that company's copper mines in Butte to its smelter in the City of Anaconda, a rail haul of some 24 miles.

tion of control would not result in any "consolidation or coordination" and that, accordingly, "[n]o employee could be adversely affected under these circumstances." Appendix I, 101a. He further found that "the only effects to the employees of the BA&P after the acquisition would be those that might result from *economic* considerations." Appendix I, 103a. He nevertheless concluded that the "contracts" he envisioned had been made by ARCO and Anaconda in their application to the ICC, rendered "irrelevant" the fact "that the employees were affected by economic factors which arose subsequent to the transaction." *Ibid.* This liability order was followed by additional proceedings before the arbitration panel to determine the scope and amount of benefits awarded the employees. The order of Arbitrator Cassle determining the amounts of benefits for each claimant was not issued until May 15, 1986.

After the liability decision by Arbitrator Cassle, BA&P, in December 1984, filed a petition with the ICC for a declaratory order relating to the Cassle decision. It also filed a complaint in the United States District Court for the District of Wyoming (later transferred to Montana) to have the decision vacated and set aside. Copies of these pleadings were contemporaneously sent to counsel for UTU as well as Arbitrator Cassle. See Appendix B, 25a. The petition to the ICC requested answers to three questions: (1) whether the Commission had at the time it authorized the control of BA&P by ARCO and Anaconda approved a pre-transaction agreement with employees, as held by Arbitrator Cassle, (2) whether BA&P is liable only for job changes that are causally related to the control transaction, and (3) whether BA&P would be in compliance with the prescribed *New York Dock* conditions if it refused to pay claims awarded by Arbitrator Cassle. Appendix C, 36a-37a.⁶

⁶ At the time the petition was filed with the ICC the Commission was not reviewing arbitrations initiated by individual employees. See, *Haskell H. Bell v. Western Maryland Railway Company*, 366 I.C.C. 64 (1981). Therefore, the petition did not request review

Although petitioners had notice of the petition BA&P filed with the ICC for clarification of its order prescribing labor protective conditions from December of 1984, and was reminded that the petition was pending by the "Nunc Pro Tunc" order of Arbitrator Cassle dated February 5, 1985,⁷ they took no action to become involved with ICC jurisdiction before December 22, 1986 when a certified copy of the record before Arbitrator Cassle was filed with the ICC. (Appendix C, 37a, fn. 6). Then, on February 23, 1987 an *ex parte* letter was addressed to the ICC by petitioners setting forth their arguments for denial of BA&P's petition. Finally, on April 16, 1987 petitioners filed a petition to intervene in the ICC proceedings and attached a copy of the February 23, 1987 letter. See Appendix B, 25a-26a.

On April 28, 1987 the Commission served its decision in the so-called *Lace Curtain* case in which it announced that it would accept jurisdiction to review arbitration awards under Commission imposed employee protective

per se of the Cassle ruling. The Commission was, however, reviewing compliance with labor conditions it had prescribed. See, *Leavens v. Burlington Northern*, 348 I.C.C. 962 (1977).

⁷ The "Nunc Pro Tunc" order is copied in Appendix H, 87a. The order recites that it is in response to the ICC petition as well as the District Court complaint filed by BA&P. It repeats the holding in the liability order of September 26, 1984 that a contract was formed with the ICC to extend protection to employees "regardless of cause." It adds, paragraph 4, that a "direct causal connection" exists "between the control transaction" and the job changes for which claims to *New York Dock* benefits were made. Since the order offers no independent explanation of the "causal connection," reference must be made to the September 26, 1984 order in which it was found that job losses were caused by *economic* conditions rather than the control transaction itself (Appendix I, 101a-103a). In other words, the causal nexus is made up of the economic conditions that led to the job losses. As shown *infra* this is not the causal nexus required to establish eligibility for *New York Dock* benefits.

provisions.⁸ The Commission stated that awards would not be vacated “unless there is egregious error, the award fails to draw its essence from the collective bargaining agreement, or the arbitrator exceeds the specific contract limits on his authority.” Appendix M, 129a.⁹ It was added by the Commission that it did not intend to review arbitrations on “issues of causation, the calculation of benefits, or the resolution of other factual questions.” *Id.* at 130a.

On March 2, 1988 the Commission served its decision reviewing the Cassle arbitration award. Appendix C, 35a-53a. The UTU petition to intervene filed April 16, 1987 was granted and the questions propounded in BA&P’s petition for a declaratory order following the Cassle liability order (Appendix I, 89a) were answered. The Cassle arbitration award was reversed.

The Commission determined that it would review the Cassle award pursuant to its authority under 49 U.S.C. § 11351 to issue supplemental orders in proceedings in which it has previously exercised its authority as it did in approving the ARCO-Anaconda control transaction. Appendix C, 43a-44a. It thereafter noted that it would be guided in its review by the same standards announced in the *Lace Curtain* case. *Id.* at 45a-46a.

The Commission then concluded that Arbitrator Cassle had misinterpreted the scope of labor protection imposed

⁸ Appendix M, 119a. *Chicago and North Western Tptn. Co.—Abandonment*, 3 I.C.C. 2d 729 (1987) (*Lace Curtain*), *aff’d sub nom. International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330 (D.C. Cir. 1988).

⁹ The standards adopted by the Commission for review of arbitration awards were based upon its reading of the decisions of the 11th Circuit in *Wallace v. Civil Aeronautics Board*, 755 F.2d 861 (11th Cir. 1985) and this Court’s decisions in what has become known as the Steelworkers Trilogy: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

in the control proceeding when he found that ARCO was contractually committed to pay benefits to adversely affected employees regardless of cause. *Id.* at 46a-47a. It found that it had not approved any such agreement in the control proceeding and that the arbitrator's decision "failed to draw its essence from the conditions imposed by this agency" as well as having "exceeded the limits of his authority as defined by the *New York Dock* conditions." *Id.* at 47a-49a.

The Commission next concluded that the arbitrator had erred in his handling of the issue of "causal nexus." *Id.* at 51a-52a. It observed that it would not review "factual" issues of causation but that here the arbitrator's "determination of causation issues was based on the flawed premise that the Commission intended *New York Dock* benefits imposed in the control transaction to cover any and all future adverse effects on BA&P employees." *Id.* at 51a. It added that the "adverse impact on an employee must be caused directly by the transaction for that employee to be accorded benefits under the conditions we imposed." *Id.* at 51a-52a. The Commission concluded that—

. . . where, as here, the injury results from factors such as the decline in the copper market rather than the transaction upon which the conditions are imposed, no basis exists for affording the affected employees the protections they seek here. The record shows that, upon acquisition of control (in 1978) no operating changes were made (or apparently even contemplated) and conditions were stable for quite some time. Anaconda's post-1979 changes were made not as a result of its 1978 acquisition of control but as a result of changing market conditions in the copper industry . . . Accordingly, we find that the neutral erred in his analysis.

Id. at 52a.¹⁰

¹⁰ Arbitrator Cassle addressed the question of causal nexus in his order dated February 3, 1984. Appendix J, 110-112a. He then

That decision by the Commission was preceded by another arbitration award involving most of the same "occurrences" considered by Arbitrator Cassle. That award was made by Arbitrator Joseph A. Sickles in January of 1988 and it *denied* all claims for benefits by the Brotherhood of Maintenance of Way Employees ("BMWE"), Brotherhood of Airline Clerks ("BAC"), and Brotherhood of Railway Carmen ("BRC"). The denial of benefits was based upon an analysis similar to that later made by the ICC in its March 2, 1988 order reversing the Cassle award, viz., that causal nexus between the control transaction and the challenged job losses had not been established.

Although UTU challenges the power of the ICC to review the Cassle arbitration, its same counsel, representing BMWE, BAC and BRC, on March 30, 1988 petitioned the ICC to review the Sickles arbitration. By filing dated April 28, 1988 UTU petitioned the ICC to reopen, reconsider and clarify the order served March 2, 1988.

These matters were considered together in a decision of the Commission, served September 21, 1989, denying both petitions. Appendix B, 14a-34a. Arguments similar to those contained in the Petition for a Writ of Certiorari before this Court were advanced to the ICC in support

ruled that two of the fourteen "occurrences" for which claims were made should be dismissed for failure of the union to establish "a sufficient causal nexus (sic) . . . between the acquisition of the Carrier [BA&P] by ARGO . . ." and the occurrence. The Arbitrator thereafter heard the evidence of BA&P on the remaining claims and issued the liability order of September 26, 1984 without making any reference whatsoever to causal nexus except for the findings in that order that no employee could be adversely affected under the circumstances and that job dislocations were the result of economic conditions. Appendix I, 101a-103a. As previously noted, those findings show that the "direct causal connection" found in the post hoc rationalization made in the Nunc Pro Tunc Order of February 6, 1985 (Appendix H, 87a) are the economic conditions found in the preceding liability order.

of the two petitions. The Commission responded to each argument and found none of them meritorious.

In regard to the Cassle arbitration the Commission addressed procedural arguments that it lacked jurisdiction to review the arbitrator's award. Appendix B, 17a-19a. It responded to UTU's contention that the Commission went beyond standards for review of arbitral awards. *Id.*, 20a-21a. It then dealt with other UTU contentions regarding the evidence (*Id.*, 21a-23a), the Nunc Pro Tunc Order of Arbitrator Cassle (*Id.*, 23a-24a), the significance of the absence of an implementing agreement that Arbitrator Cassle found was not needed (*Id.*, 24a-25a; Cf. 101a), and the due process accorded UTU (*Id.*, 25a-27a). In the end, the Commission reaffirmed its prior reversal of the Cassle award. *Id.*, 34a.

Turning to the Sickles arbitration, the Commission found no error in the arbitrator's findings on causation (*Id.*, 28a-31a), or his findings on the absence of participation of ARCO as well as Anaconda in management of BA&P. *Id.*, 31a. The Commission further found that Arbitrator Sickles had properly applied the burden of proof. *Id.* 31a-33a. Finally, the Commission found that the policy of 49 U.S.C. § 11347, mandating employee protection, was satisfied. It added:

There is no requirement in § 11347 to extend protection to employees not affected by the transaction. This is a prime reason why we disagreed with Arbitrator Cassle, for he incorrectly determined that the Commission intends employee protection to apply to employees beyond those demonstrating related injury.

Id., 33a.

The four unions involved in these proceedings (UTU, BMWE, BAC and BRC) petitioned the United States Court of Appeals for the Ninth Circuit for judicial review of the orders of the ICC. In a decision dated July 10, 1991 that Court affirmed the ICC decisions and on August 21, 1991 denied rehearing. Appendix A, 1a and L,

117a. The Court determined that the ICC is empowered to review arbitration awards under Commission prescribed labor protective conditions and that the power was properly exercised in these cases. It affirmed the Commission's conclusion that Arbitrator Cassle exceeded the scope of his jurisdiction when he "fashioned an agreement that simply did not exist." Appendix A, 12a. The Court reviewed the findings of fact of Arbitrator Cassle and the Commission's treatment of those findings, concluding contrary to Union contentions that the Commission did not substitute its findings for those of the arbitrator. The court held that:

The ICC's determination that the adverse effects suffered by BA&P employees were caused by changing market conditions does not differ significantly from Arbitrator Cassle's earlier conclusion that the "only effects to the employees of the BA&P after the acquisition would be those that might result from *economic* conditions." (Emphasis in the original.) The ICC reiterated Arbitrator Cassle's findings.

Appendix A, 13a.

To the Unions' argument that ICC findings of fact and conclusions of law are arbitrary and capricious, the Court responded by holding that "the ICC's findings were virtually identical to those initially made by Arbitrator Cassle, and they are supported by the record." *Ibid.* Having found that the ICC orders for its reversal of the Cassle arbitration award and affirmance of the Sickles arbitration award were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the Court affirmed the ICC's orders as to both arbitration awards.

ARGUMENT

I. THERE ARE NO VALID REASONS FOR GRANTING THE WRIT

This case does not present important questions of the powers of the ICC. The issue presented is primarily one of evidence. The neutral arbitrator fashioned a contract that, as the Ninth Circuit ruled, "simply did not exist." Appendix A, 12a. Before that, the ICC (which was allegedly one of the parties to the contract) found that there was no such agreement, and if there had been such an agreement it would have required the approval of the Commission to be effective in place of the prescribed *New York Dock* conditions. Appendix C, 47a-48a. Moreover, the Ninth Circuit was correct in holding that the Commission did not substitute its findings of fact for those of the arbitrator. The Commission simply held that the arbitrator proceeded from the "flawed premise" that the Commission intended *New York Dock* benefits to be made available for all job changes regardless of cause, and that from that premise he reached faulty "conclusions", requiring the facts to be "reevaluated." Appendix C, 51a. The Commission accepted the arbitrator's findings that adverse job effects were caused by extraneous economic conditions. *Id.*, 51a-52a. It disagreed, as a matter of law, with his "conclusions" that this is the causal nexus necessary to establish entitlement to *New York Dock* benefits. This is the sum and substance of this case; it does not warrant review in this court.

An arbitration award issued pursuant to labor protective conditions prescribed by the Commission is an "order" of the Commission. *United Transportation Union v. Norfolk & Western Ry. Co.*, 822 F.2d 1114, 1120 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988) ("UTU"). Additionally, such orders are issued as a result of delegation of agency authority to arbitrators under ICC prescribed labor protective conditions. The D.C. Circuit has ruled that "[t]he ICC surely did not make an irrevocable

delegation to arbitrators . . . and we can find nothing in the statute prohibiting the agency from reviewing significant arbitration awards in order to make certain that they accord with ICC regulations." *International Brotherhood of Electrical Workers v. ICC*, 862 F.2d 330, 336 (D.C. Cir. 1988) (affirming *Lace Curtain*) ("IBEW"). There is thus no reason that the ICC could not lawfully modify an arbitration award commensurate with its powers under the Interstate Commerce Act to make an award in the first instance. The Commission is not limited by the restraints observed by Courts reviewing arbitrations under other statutes such as the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, the U.S. Arbitration Act as discussed by this Court in *Wilko v. Swan*, 356 U.S. 427, 430-436 (1953) or the Labor Management Relations Act, 29 U.S.C. § 185(g), as applied in the *Steelworkers Trilogy*.¹¹ Except for the self-restraints adopted by the Commission in *Lace Curtain* there would be no basis for any question about its power to modify arbitration awards. In this case there can be no legitimate question about the Commission's power to reverse the Cassle award because, as the Ninth Circuit held, it did not depart from its self imposed restraints.¹²

The petitioners also contend that they were denied due process "under the Fourteenth Amendment to the U.S.

¹¹ See footnote 8 for citations to *Steelworkers Trilogy*.

¹² Even if the Commission had departed from its adopted standards for review, its departure would be lawful if properly explained. See, *Wallace v. Civil Aeronautics Board*, 755 F.2d 861, 864-5 (11th Cir. 1985). Aside from that, under the other statutes an arbitration award that fails to "draw its essence" from the collective bargaining agreement or, in this instance, the *New York Dock* conditions, or is made in manifest disregard of the law, can not be enforced. See *Steelworkers Trilogy*, 363 U.S. at 597; cf. *Wilko v. Swan*, 356 U.S. at 436 (arbitration awards may be reviewed for "manifest disregard of the law"). As the proceedings below have demonstrated, Arbitrator Cassle's liability ruling failed to draw its essence from the *New York Dock* conditions and was made in manifest disregard of the law.

Constitution" (Brief In Opposition, 14) and that there is a conflict among the circuits that this Court should resolve. These contentions are without merit, as shown below.

II. THE ACTIONS OF THE COMMISSION WERE NOT ARBITRARY OR CAPRICIOUS AND PETITIONERS WERE NOT DENIED DUE PROCESS

Petitioners' scatter-shot objections to the procedures employed by the ICC were considered and rejected by the Commission. Appendix B, 17a-20a, 21a-27a. In the final analysis, those objections come down to contentions of (1) delay in decision-making by the ICC, (2) retroactive application to this case of the decision in *Lace Curtain*, and (3) denial of due process in not being granted intervention in the ICC proceeding until the March 2, 1988 decision of the Commission (Appendix C, 38a-53a).¹³

What petitioners do not point out is the delay in the arbitration proceedings. Arbitrator Cassle was appointed June 24, 1982 and did not render his final order fixing the amounts of benefits until May 15, 1986—a period one month short of four years. The ICC served its first decision on March 2, 1988, three and one-fourth years after

¹³ Petitioners' complaint that the ICC reviewed the Cassle arbitration without a request for review, deserves little comment. The ICC staked out broad grounds of discretion for its action, saying: "While the specific action taken was not sought by the parties, it was an appropriate exercise of our authority, including the mandate of § 11347 to impose employee protection and our authority under § 11351 to issue supplemental orders. In any event we have broad authority to conduct proceedings and investigate matters as we find appropriate. See, e.g., 49 U.S.C. § 10321. Ample authority also existed for review on our own motion under § 10327(g)(1), as well as under our inherent power to interpret the labor protective conditions we have imposed." Appendix B, 19a. The Ninth Circuit on review said that the issue "does not trouble us. Pursuant to 49 U.S.C. § 10327(g)(1) (1988) the Commission may 'at any time on its own initiative' reopen a proceeding because of material error." Appendix A, 10a.

BA&P filed its petition on December 11, 1984. The petitioners themselves waited over two years after being served with a copy of BA&P's petition to the ICC before submitting the February 23, 1987 letter to the Commission, followed by the petition to intervene dated April 16, 1987. Appendix B, 25a-26a. Although petitioners complain of costs in resources and man-hours incurred in the arbitration process and associated District Court actions pending action by the ICC, they do not (as they could not) charge that the delays before the ICC affected their hearing or other rights or that they were otherwise prejudiced.¹⁴

The Commission's announcement in *Lace Curtain* that it would review arbitrations rendered pursuant to prescribed labor protective conditions, was appropriate. Although the Commission had declined to become involved in arbitrations initiated by individual employees, it had entertained petitions to review compliance with its previously formulated labor protective conditions.¹⁵ It was within the discretion of the Commission to announce in an adjudication rather than a rulemaking the clarification that it would review arbitrations mandated by labor protective conditions imposed by the Commission; and the fact that the announcement in *Lace Curtain* was applied retroactively to this case is not a valid ground of objection.¹⁶

¹⁴ Delays in agency action of the kind experienced here are not grounds for overturning administrative action. See, e.g., *NLRB v. Pool Mfg. Co.*, 339 U.S. 577, 581-82 (1951); *Irish v. SEC*, 367 F.2d 637, 639 (9th Cir. 1966); *NLRB v. Staub Cleaners, Inc.*, 418 F.2d 1086, 1089-90 (2d Cir. 1969), *cert. denied*, 397 U.S. 1038 (1970).

¹⁵ See footnote 6, *supra*; Appendix M, 128a-129a.

¹⁶ "[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency" and retroactivity does not affect validity where it is not "contrary to a statutory design or to legal and equitable principles." *Securities Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947); accord:

For their due process claim petitioners erroneously allege, for the first time in this Court, "deprivation of due process under the Fourteenth Amendment to the U.S. Constitution." Even if the claim had been timely raised and phrased in terms applicable to federal agencies, it would have no merit. The claim assumes that the ICC substituted its findings of fact for those of the arbitrator, when, in truth, as held by the Ninth Circuit, the Commission "merely reiterated Arbitrator Cassle's earlier findings." Appendix A, 13a. For the same reason, the petitioners' contention that the ICC conducted a "trial de novo" has no basis in fact. This leaves only the argument that the ICC did not give UTU the "opportunity to intervene in a timely fashion" as the basis for the constitutional claim. See, Petition, 14. UTU neither claims nor was entitled to an oral hearing as opposed to modified procedure. *United States v. Florida East Coast Railroad Company*, 410 U.S. 224 (1973); *United States v. Alleghany—Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Matthews v. Eldridge*, 424 U.S. 319 (1976). In addition, due process does not require that the opportunity to be heard occur at any particular point in the administrative process, either before or after official action is taken. *United States v. Illinois Central R. Co.*, 291 U.S. 457, 463 (1934); *Bowles v. Willingham*, 321 U.S. 503, 520 (1944); *Lichter v. United States*, 334 U.S. 742, 791-2 (1948); *Palmer v. McMahon*, 133 U.S. 660 (1890). Thus, there is no constitutional basis for the petitioners' due process claim.

Aside from that, it needs to be observed that UTU was given a full opportunity to be heard. It waited over two years after being served with a copy of BA&P's petition

NLRB v. Wyman-Gordon Co., 394 U.S. 759, 772 (1969); *NLRB v. Bell Aerospace Company*, 416 U.S. 257, 292-295 (1974). For all of the reasons given by the Court in *Wallace v. Civil Aeronautics Board*, 755 F.2d 861, 865 (11th Cir. 1985) for review of arbitrations under similar circumstances by the Civil Aeronautics Board, it is appropriate and consistent with statutory design for the Commission to do the same. See, Appendix M, 125a-126a.

to the ICC before seeking intervention and it then made a full presentation to the ICC (Appendix B, 25a-26a). If it were not satisfied with the evidence before the Commission it could have sought discovery (49 C.F.R. Part 1114) or even cross-examination of witnesses whose written statements were received by the Commission under the modified procedure (49 C.F.R. 1112). It did none of these things. It did, however, receive full consideration of its arguments in the very first decision of the Commission (Appendix C, 35a) and, as a constituent member of the Railway Labor Executives' Association, it had the benefit of that organization's opposition to BA&P to add to its own. It then petitioned the ICC for reconsideration which resulted in a full review of its arguments for a second time (Appendix B, 14a). There is thus no legal basis for, nor substance in, the claim of deprivation of due process.

III. THE ICC DID NOT CLAIM A BROADER STANDARD OF REVIEW THAN THE COURTS, NOR SUBSTITUTE ITS FINDINGS FOR THOSE OF THE ARBITRATOR

As previously shown, the petitioners are in error in asserting that the ICC substituted its findings of fact for those of the arbitrator. They are equally in error in charging that the ICC admits substituting findings. The Commission merely said that "conclusions" of the arbitrator were faulty and the facts need to be "reevaluated." Petition, 15. As the Ninth Circuit recognized, the ICC accepted the arbitrator's earlier ruling that the "only effects to the employees of the BA&P after the acquisition would be those that might result from *economic* conditions." (Appendix A, 13a).

The petitioners also err in their contention that the "Nunc Pro Tunc" order of February 6, 1985 established the necessary causal nexus between the acquisition and subsequent job changes. (See, Petition, 18 and Appendix H, 88a). The arbitrator's reference in Finding 4 to a

"direct causal connection" is necessarily based on the finding in the earlier liability order (Appendix I, 103a) that job changes resulted from economic causes. Thus, to the arbitrator, economic cause became the connecting link. The ICC ruled as a matter of law that such a connection is not sufficient (Appendix C, 50a).

Further still, the petitioners misperceive the language of the arbitrator in arguing that he ruled that job changes were not caused by economic conditions (Petition, 16). He stated that BA&P "has sought to avoid payment of *New York Dock II* benefits on the theory" that economic conditions caused the adverse job effects and then added that the position of BA&P is without merit "in light of the applicants' submissions to the ICC and the reasonable conclusions and expectations to be drawn therefrom." (Appendix I, 102a quoted at Petition, 16). The telling reference to applicants' ICC submissions is the express basis for the arbitrator's unlawful holding that ARCO-Anaconda became liable by contract with the ICC for *New York Dock* benefits regardless of cause. (Appendix I, 103a and Appendix H, 88a, finding 1). In other words, the arbitrator did not hold that economic conditions were not the cause of adverse job effects but, rather, that economic conditions would not excuse BA&P from payments of benefits because its liability was based on contract.

In addition to these errors, the petitioners appear to suggest that review of arbitrations by the ICC must be limited by review standards contained in the Railway Labor Act, 45 U.S.C. § 151 et seq. ("RLA") (Petition, 17-19). In the first place, the preemption provisions of 49 U.S.C. § 11341 operate to prevent requirements of the RLA from superseding the authority of the ICC over acquisitions approved pursuant to former Section 5 of the ICA, recodified as 49 U.S.C. § 11343. As a consequence, the ICC is empowered to approve transactions subject to § 11343 without regard to the RLA and under terms and

conditions that actually conflict with existing collective bargaining agreements as well as RLA procedures.¹⁷

In the second place, even if the preemption provisions of the ICA were not effective in this instance, the RLA, by its very own terms, does not apply. As this Court has stated many times, the purpose of the RLA is to “promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements.” See, e.g., *Union Pacific Railroad Company v. Sheehan*, 439 U.S. 89, 94 (1978) (“Sheehan”). Pursuant to this objective the RLA provides for three forms of arbitration. The first, under 45 U.S.C. § 153 First, is mandatory arbitration of “minor” disputes, involving the interpretation of collective-bargaining agreements, before the National Railroad Adjustment Board (“NRAB”). See, *Andrews v. Louisville & Nashville Railroad Company, et al.*, 406 U.S. 320, 322 (1972) (“Andrews”).¹⁸ The second is arbitration pursuant to the parties “mutually agreeing”, under § 153 Second, to a system substitute for the NRAB in the form of regional boards, public law boards and the like. The third also requires the mutual agreement of the parties pursuant to § 157 of the RLA for arbitration, in accordance with the prescribed procedure, of a “controversy.” Section 157 First provides that “such controversy may, by agreement of the parties to

¹⁷ *Brotherhood of Locomotive Engineers v. Chicago & North Western Railroad*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963); *Burlington Northern, Inc. v. American Railway Supervisors Association*, 503 F.2d 58, 62-63 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *Missouri Pacific R. Co. v. United Transportation Union General Committee of Adjustment*, 580 F. Supp. 1490, 1501 (E.D. Mo. 1984), aff’d 782 F.2d 107, 111-112 (8th Cir. 1986), cert. denied, 482 U.S. 927 (1987); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.*, 788 F.2d 794, 800-802 (1st Cir.), cert. denied, 479 U.S. 829 (1986).

¹⁸ Needless to say, the arbitration in this case was not conducted by the NRAB or by a public law board.

such controversy, be submitted to the arbitration of a board of three . . . persons." In a proviso to that section it is stated that "the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise."

In this case, BA&P refused arbitration and UTU exercised its privilege under Section 4 of the *New York Dock* conditions, 360 ICC at 85, to have an arbitrator appointed by the National Mediation Board. Thereafter, when BA&P sought an injunction against the arbitration, the U.S. District Court for the District of Montana (Appendix F, 67a-75a) held that arbitration under *New York Dock* is mandatory. BA&P participated in the arbitration proceeding over its objection. It emphatically rejected arbitration under the RLA and that statute is not, by its own terms, applicable.¹⁹

For these reasons, the RLA cases on which petitioners rely do not govern review standards for *New York Dock* arbitrations. See *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272 (8th Cir. 1982);²⁰ *Armstrong Lodge No. 762*

¹⁹ There are good reasons that BA&P has not agreed to RLA arbitration. As this Court has frequently noted:

Judicial review of Adjustment Board orders is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to inform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption. 45 U.S.C. § 153 First (q).

Sheehan, 439 U.S. at 93; *Andrews*, 406 U.S. at 325; *Lomomotive Engineers v. Louisville & Nashville R. Co.*, 373 U.S. 33, 38 (1963). The emphasis on the terms and purposes of the RLA make arbitration under that statute inappropriate for the IC Act concerns that animate the *New York Dock* conditions. The importance of the ICC and ICA perspective was underscored by the ICC in its *Lace Curtain* decision. See Appendix M, 125a-127a.

²⁰ The petitioners erroneously contend that the ICC "relied heavily" on the *Loveless* decision (Petition, 17). The fact is that the ICC merely referred to the *Loveless* decision in *Lace Curtain*

v. Union Pacific, 783 F.2d 131, 134 (8th Cir. 1986) (parties mutually agreed to RLA type review); *Brotherhood of Locomotive Engineers v. ICC*, 885 F.2d 446 (8th Cir. 1989) (parties agreed to arbitration under RLA in an agreement approved by the ICC) ("BLE"). Other decisions relied upon by petitioners are not apposite because they either do not concern ICC imposed labor protective conditions or they arose before 1988 when the review powers of the ICC were clarified in *IBEW*, 862 F.2d at 336-38 and *UTU* 822 F.2d at 1120.²¹ Those cases are: *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3d Cir. 1969) (arbitration of dispute under collective bargaining agreement); *Ferrick v. Baltimore & Ohio Railroad Co.*, 447 F.2d 89 (3d Cir. 1971) (arbitration under ICC imposed conditions predating *IBEW*).

The petitioners are simply wrong on the facts when they allege that the ICC substituted its own findings of fact for those of the arbitrator. They are also wrong when they seek standards of review under the RLA or under any other regime that ignores the review powers of the ICC. Moreover, as the Ninth Circuit has ruled, the ICC's review of the Cassle arbitration in this case was perfectly consistent with the standards of review adopted in *Lace Curtain*.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS

Contrary to the contention of petitioners there is no conflict between the judgment of the Ninth Circuit in this case and the decision of the Eighth Circuit in *BLE*. The decision in *BLE* arose under the RLA because the parties

for its elaboration of the *Steelworkers Trilogy* standards (Appendix M, 129a) and again for the same purpose in its March 2, 1988 decision in this case (Appendix C, 45a-46a). As has been pointed out, the ICC's review in this case complied fully with those standards.

²¹ See, also, *Lee v. St. Louis Southwestern Railway Co.*, 633 F. Supp. 19, 20 (E.D. Mo. 1986); *Atkinson v. Union Pacific Railroad Company*, 628 F. Supp. 1117, 1120 (D. Kan. 1985).

agreed in a Merger Protective Agreement approved by the ICC that arbitration disputes would be submitted "to a Public Law Board under the procedures set forth by the National Mediation Board pursuant to amended Railway Labor Act" and that awards of such board "shall have the same force and effect as awards of the National Railroad Adjustment Board." *BLE*, 885 F.2d at 448-49, 450. For those reasons it was held that the ICC had no authority to review an arbitration award finding an adversely affected employee entitled to labor protective benefits. Moreover, unlike this case, the ICC in that case was found by the Court (in an alternative ruling) to have substituted its own finding of fact for that of the arbitrator in violation of the *Lace Curtain* standards. *Id.* at 451. The Eighth Circuit decision is thus based upon a different law and a different set of circumstances from the situation reviewed by the Ninth Circuit. There is no conflict between them.

Moreover, the result below is in keeping with decisions of this Court relating to the effect to be given labor protective conditions approved or prescribed by the ICC. In *Nemitz*, 404 U.S. at 43-45, this Court held that the labor protective conditions of the Commission's authorization of a transaction approved under the predecessor to §§ 11343 and 11347 of the ICA were not subject to alteration by a post-merger agreement bargained collectively under the RLA. This Court has recognized since 1939 that the Commission's power to impose labor protective conditions on rail transactions under provisions of the ICA now codified in § 11347 is "an essential aid to the maintenance" of the interstate rail system. *United States v. Lowden*, 308 U.S. 225, 235-236 (1939); see *Railway Labor Executives' Association v. United States*, 339 U.S. 142 (1950); *Brotherhood of Maintenance of Way Employees v. United States*, 366 U.S. 169 (1961). If the Commission is to be the repository of such powers it must also have the power to supervise compliance with labor conditions imposed upon approved transactions. It

can not be governed by RLA considerations or decisions of arbitrators (as in the Cassle arbitration) that effectively usurp powers the Commission never delegated.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Date: January 16, 1992